BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

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| In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area | ) ) ) ) | Case No. GR-2009-0355 |

**MISSOURI GAS ENERGY'S REPLY TO PUBLIC COUNSEL'S RESPONSE TO COMMISSION ORDER DIRECTING RESPONSES TO OBJECTIONS TO A REQUEST THAT THE COMMISSION TAKE OFFICIAL NOTICE OF CERTAIN MATTERS AND TO THE ADMISSION OF PAGES 2 AND 3 OF STAFF EXHIBIT 103 AND FURTHER OBJECTION**

COMES NOW Missouri Gas Energy ("MGE" or the "Company"), a division of Southern Union Company, and submits the following reply to Public Counsel's reply to MGE's objections to Public Counsel's request that the Commission take official notice of customer comment cards and to the admission of selected pages of Staff Exhibit 103.

**THE CUSTOMER COMMENT CARDS**

1. On November 5, 2009, the Commission directed the parties to this case to file by November 10th any responses they might have to the objections lodged by MGE to Public Counsel's request that the Commission take official notice of mailed-in customer comment cards and, also to pages 2 and 3 of Staff Exhibit 103.

2. Public Counsel filed its reply on November 11th addressing those two matters and, presumably, making an additional offer of the comment cards

as survey evidence, citing §536.070(11) RSMo.[1] That reply does not provide legitimate grounds for official notice of the cards, admission of the disputed pages of Exhibit 103 or as a direct offer of document evidence.

3. Public Counsel begins with the general statement that considering customer comments has been "a common and accepted practice" in rate cases. This is generally correct but past practice, consistent with the requirements of the Missouri Administrative Procedure Act ("MoAPA"), has been to take those comments in the form of testimony at local public hearings, on the record, under oath and subject to cross-examination and rebuttal. These are the fundamental requirements of due process in a contested case. The comment cards come with none of these critical procedural protections.

4. Public Counsel asserts that the customer comments are not being offered for the truth of the matter asserted.[2] If that is so, what value can possibly be derived by compelling the commissioners to read each of them?[3] If a customer writes on a card "I oppose the rate increase", but it's not being offered for the truth of that person's viewpoint, is the Commission free to conclude that the statement is not true and the customer actually *favors* a rate increase? Or is indifferent? This is absurd. *Of course* they are being offered for their truth.

[1] It is unclear whether Public Counsel is offering the comment card themselves into the record or merely pointing to this provision of the MoAPA as an exception to the hearsay rule. Consequently, MGE will address both implications.
[2] Public Counsel Reply ¶4.
[3] Public Counsel states that "reading these customer comments . . . of the 12,000 customers . . . will . . . assist the Commission . . ." *Id*. Indeed, if the comment cards are made part of the record, by official notice or otherwise, §536.080.2 RSMo may require that the commissioners do exactly that.

Public Counsel wants to be able to say "Customer X opposes the rate increase." No other plausible purpose can be served.

5. Public Counsel states there "is a long case history of courts taking judicial notice of their own public records."[4] This contention, to the extent it has any merit, is undermined by the inconvenient fact that the comment cards are *not* public records. They have been classified as highly confidential and only a very limited universe of authorized persons has access to them. Also, the comment cards are not records of the Commission in any meaningful sense of the phrase. The Commission's passive role as a repository for the cards hardly transforms them into an official record of the Commission in the sense that a prior order or Commission-sponsored task force report represents some official action on the part of the agency.

6. For the first time, Public Counsel asserts the comment cards are admissible as a customer survey, even though it has not sponsored any survey results and, further, even though Staff, the party said to have performed this undertaking, has not offered a study, summary or assessment. This is a theory in desperate need of some facts.

7. <u>For the record, MGE objects to Public Counsel's offer of the comment cards as survey evidence to the extent that is the intent of paragraph 6</u>

[4] Public Counsel Reply ¶5. The court cases cited by Public Counsel offer it no solace. The *Raytown* case involved judicial notice of the records of the State Auditor evidencing the lawful registration of municipal bonds. The *Borrson* case involved judicial notice of a State Highway Commission map showing the location of the town of New Melle, Missouri. The *Arata* case involved judicial notice by a court of a previous judgment of condemnation of real estate. None of these address taking judicial notice of unsworn testimony.

of the Reply. The statute cited by Public Counsel permits the admission of the results of statistical examinations, studies or audits, compilations of figures or surveys *but only if*:

- Done under the supervision of a person,
- Present at the hearing,
- Who testifies to the accuracy of the results,
- Who is subject to cross examination; and
- It appears that the person is qualified to undertake the study.

These requirements have not been met. Ms. Fred, the Staff witness upon whom Public Counsel attempts to bootstrap its offer, testified that she had no involvement in the process other than being the recipient of the cards. Tr. 801. She had no real idea what the purpose of the exercise was. Tr. 802. There is no evidence that the comment cards were fashioned by Staff to elicit specific, reliable data for the purpose of any particular analysis. Ms. Fred was not directed to perform any particular analysis or study. *Id.* Importantly for the issue at hand, Ms. Fred performed no particular analysis of them. *Id.* In fact, there is no evidence of how many of the cards address the issue of rate design.

Q. (Comm. Clayton) So we have no way of knowing what
3 percentage of those cards would even relate to the rate
4 design question?
5 A. Not without going back through them again
6 and determining that.

Tr. 803. Given that Ms. Fred stated she did not analyze the cards to make any conclusions about the nature of the comments (unlike the case with customer complaints and inquiries) it is not surprising that there are no study results, summaries or even opinions; just the cards themselves.[5]

8. Public Counsel predictably resorts to the old saw that the Commission is not bound by "technical" rules of evidence.[6] Evidentiary objections going to the admissibility of document or testimonial evidence are not informalities. They address *fundamental* rules of evidence. *State ex rel. DeWeese v. Morris*, 395 Mo. 194, 221 S.W.2d 206, 209 (1949).

9. Public Counsel's various justifications for the Commission to take official notice of the customer comment cards culminates with this rather astonishing statement: "**The Commission is within its authority to receive inadmissible evidence . . .**"[7] That statement is a red flag concession on the part of Public Counsel that the customer comment cards are, in fact, not competent evidence under the applicable statutory standards set forth in the MoAPA. When a party is reduced to urging the Commission to do admit inadmissible evidence, alarm bells should be sounding.

10. Finally, Public Counsel's moralizing in paragraphs 9 and 10 of its reply needs to be considered in context. Public Counsel claims that it is

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[5] Contrast this with the tabulations prepared by Ms. Fred concerning customer complaints and inquiries on those pages of Exhibit 103 to which MGE has not objected. Even in *that* circumstance, it is telling that Commissioner Clayton observed that "the complaint numbers you've given me are not statistically or scientifically determined, so <u>we can't use this as an actual survey</u>." (emphasis added) Tr. 796.

[6] Public Counsel Reply ¶7.

[7] *Id*.

"surprising" that MGE has made its objections. The undeniable fact, however, is that Public Counsel can only have been surprised if it was not paying attention. The Company long ago noted its reservations about the value of embarking on an enterprise of soliciting customer comment cards in the context of a contested case that is governed by rules of evidence. In June of this year, MGE stated the following at the time Public Counsel was actively urging the Commission to direct the Company to send out the cards:

> Lastly, the Customer Comment Card proposed by the Public Counsel may be misleading if customers interpret those comments to be something that can be considered by the Commission and a substitute for attendance at a local public hearing. The Commission's ultimate decision must be supported by competent and substantial evidence on the whole record**;** based on lawful procedure or a fair trial; and the Commission must not act arbitrarily, capriciously, unreasonably, or abuse its discretion. *See State ex rel. Nixon v. PSC (State ex rel. Public Counsel)*, 274 S.W.3d 569 (Mo.App.W.D. 2009). The use of written comments, not under oath, mailed to the Consumer Services Department would not satisfy this standard.[8]

Despite this clearly telegraphed message, Public Counsel now insists that it is shocked . . . shocked! that the Company has objected. The plain fact of the matter is that Public Counsel should have known all along that the admissibility of the comment cards was in question and was likely to be challenged. If customers end up being disappointed, the responsibility for this state of affairs rests with Public Counsel, not MGE.

[8] See, MGE's Objection to Public Counsel's Customer Notice Recommendation and Proposed Alternative Notice, EFIS Doc. No. 41. June 11, 2009.

## PAGES 2 AND 3 OF EXHIBIT 103

11. Public Counsel's rationale for admitting pages 2 and 3 of Exhibit 103 is reason enough to exclude the information. Unable to articulate the significance of the number of comment cards filed (because this is the first time such cards have ever been sent out), Public Counsel offers pure conjecture as a justification.[9] This perfectly illustrates the problem MGE has endeavored to point out, that is, the fact that a particular number of cards has been returned is a meaningless fact. All it does is tempt parties to speculate about its significance. Speculation and conjecture have no place in a process where the Commission's ultimate decision must be based on competent and substantial evidence.

## CONCLUSION

Public Counsel has provided no basis for the Commission to take official notice of the comment cards or the number of comment cards received by the Commission. Additionally, Public Counsel has not qualified the customer cards as the results of a survey, study or audit by any proper party. Finally, Public Counsel provides no grounds showing that the number of comment cards received by the Commission is relevant to any issue before it.

WHEREFORE, Public Counsel's request (1) that the Commission take official notice of the customer comment cards (2) that the cards should be admitted as a survey and (3) that pages 2 and 3 of Staff Exhibit 103 should not be admitted into the record should be denied.

[9] Public Counsel Reply ¶8.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on the 13th day of November, 2009, to the following:

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